

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

KENNETH KERRIGAN et al.,

Plaintiffs,

**5:11-cv-1320
(GLS/ATB)**

v.

**NEW YORK STATE ELECTRIC &
GAS CORPORATION et al.,**

Defendants.

APPEARANCES:

OF COUNSEL:

FOR THE PLAINTIFFS:

Powers, Santola Law Firm
39 North Pearl Street
2nd Floor
Albany, NY 12207-2205

DANIEL R. SANTOLA, ESQ.

FOR THE DEFENDANTS:

*New York State Electric & Gas
Corporation*

Ward, Greenberg Law Firm
300 State Street
Rochester, NY 14614

THOMAS E. REIDY, ESQ.

Comcast Corporation

Abrams, Gorelick Law Firm
1 Battery Park Plaza
4th Floor
New York, NY 10004

JESSICA NAPOLI, ESQ.

Verizon Communications, Inc.

Phillips, Lytle Law Firm
Omni Plaza

MARC H. GOLDBERG, ESQ.

30 South Pearl Street
Albany, NY 12207

Gary L. Sharpe
Chief Judge

MEMORANDUM-DECISION AND ORDER

I. Introduction

Plaintiffs Kenneth Kerrigan (Kerrigan) and his wife, Tammy Kerrigan, commenced this action pursuant to 28 U.S.C. § 1332 against defendants New York State Electric & Gas Corporation (NYSEG), Comcast Corporation, and Verizon Communications, Inc., seeking damages for personal injuries sustained by Kerrigan. (See Compl., Dkt. No. 1.) Pending is Comcast's motion for summary judgment dismissing the Complaint and all cross claims against it. (See Dkt. No. 25.) For the reasons that follow, the motion is denied as premature.

II. Background

A. Facts¹

On October 29, 2010, Kerrigan sustained an injury while working for Hawkeye, LLC, a company that was previously hired by NYSEG to "provide[] line construction and related services," in the Town of Carmel,

¹ The facts are undisputed.

Putnam County. (Def. Comcast's Statement of Material Facts (SMF) ¶¶ 1, 2, 6, 12, Dkt. No. 25, Attach. 1.) While a Hawkeye work crew was "performing certain work on the utility poles located at or about 151 Shear Hill Road," Kerrigan's co-worker, Vanner Kenneth, was directed to move a truck with an attached trailer "to allow traffic to move around an obstruction." (*Id.* ¶¶ 7-10.) Kerrigan, who was directing traffic at the time that Kenneth moved the truck and trailer, was struck by the trailer and injured. (*Id.* ¶¶ 11-12.) "The vehicle that struck [Kerrigan] at the time of the accident was neither owned by Comcast nor operated by a Comcast employee"; it is also clear that "no Comcast employees, contractors or subcontractors [were] present at or about the location of the accident." (*Id.* ¶¶ 13, 17, 19.)

B. Procedural History

Plaintiffs filed their Complaint on November 7, 2011, asserting common-law negligence, violations of N.Y. Labor Law §§ 200, 240, and 241, and a derivative claim for loss of consortium against all defendants.² (See Compl. ¶¶ 26-45.) Defendants separately answered and each

² Notably, the Kerrigans have withdrawn their N.Y. Labor Law § 240(1) cause of action as against Comcast. (See Dkt. No. 27 ¶ 2.) The court hereby dismisses that claim as withdrawn.

alleged cross claims against the others. (See Dkt. Nos. 7, 10, 12, 14-19.) Comcast filed the instant summary judgment motion before appearing for a Rule 16 conference or engaging in any discovery.³ (See Dkt. No. 25.)

III. Standard of Review

The standard of review pursuant to Fed. R. Civ. P. 56 is well established and will not be repeated here. For a full discussion of the standard, the court refers the parties to its recent decision in *Wagner v. Swarts*, No. 1:09-cv-652, 2011 WL 5599571, *4 (N.D.N.Y. Nov. 17, 2011).

IV. Discussion

Comcast contends that the Complaint and all cross claims should be dismissed in their entirety as against it. (See *generally* Dkt. No. 25, Attach. 16 at 7-18.) The Kerrigans counter, and the court agrees, that the motion is premature and should be denied. (See Dkt. No. 2-5.)

As relevant here, when a nonmovant is able to show “by affidavit or declaration that, for specific reasons, it cannot present facts essential to justify its opposition [to a summary judgment motion], the court may . . . defer considering the motion or deny it.” Fed. R. Civ. P. 56(d). Because

³ A conference scheduled for March 12, 2012 before Magistrate Judge Andrew T. Baxter was cancelled by text order dated March 9, 2012 in light of Comcast’s pending motion.

plaintiffs have submitted an affidavit sufficiently setting forth their inability to present facts essential to justify their opposition to this motion, (see Dkt. No. 27), the court deems it appropriate to deny the motion as premature with leave to renew at a proper time.

V. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that plaintiff's N.Y. Labor Law § 240(1) claim against Comcast (Dkt. No. 1) is **DISMISSED** as withdrawn; and it is further

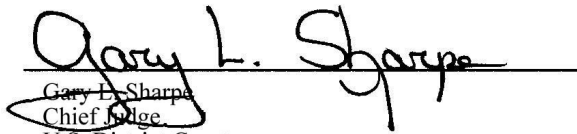
ORDERED that Comcast's motion (Dkt. No. 25) is **DENIED** as premature with leave to renew; and it is further

ORDERED that the parties contact Magistrate Judge Baxter to schedule further proceedings in accordance with this Memorandum–Decision and Order; and it is further

ORDERED that the Clerk provide a copy of this Memorandum–Decision and Order to the parties.

IT IS SO ORDERED.

April 25, 2012
Albany, New York



Gary L. Sharpe
Chief Judge
U.S. District Court